

**Dato' Seri Anwar bin Ibrahim v
Sun Media Corp Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-08 OF 1999
KAMALANATHAN RATNAM J
20 MAY 1999

Civil Procedure — Pleadings — Facts not pleaded — Late service of affidavit not pleaded — Whether defendant expected to reply — Whether defendant ought to know that it was the affidavit plaintiff was objecting to

The plaintiff sued the defendant for libel contained in an article published in the newspaper. The defendant admitted publishing the article but raised the defence of qualified privilege. The defendant filed an application for leave under O 33 r 2 of the Rules of the High Court 1980 for certain issues to be decided before the trial. The plaintiff raised a preliminary objection that the affidavit in support of the defendant's application was served more than 14 days from the date of the filing of the application. The defendant submitted that the affidavit signed by the plaintiff's counsel had clearly referred to the fact that the summons was served outside the 14-day period and not to the late service of the affidavit. It was submitted that the summons was served within time pursuant to O 32 r 3.

Held, dismissing the preliminary objection and allowing the defendant's application:

- (1) The plaintiff must know that if he had specifically pleaded in the affidavit that the summons was served out of time and made no mention of the fact that the affidavit was served late, then that was all the defendant was expected to reply. In fact, the defendant correctly made no reply to the affidavit of counsel for the plaintiff because the defendant was contented to rest its case on O 32 r 3 and the fact that the defendant had therefore served the summons well within time. The submission that the defendant ought to know that it was the affidavit the plaintiff was objecting to was an argument that was non sequitur (see p 287D-E).
- (2) Both parties have submitted fully on the relevant issues. If the court were to decide on those issues at this stage, then the court is pre-empting the actual application that ought to be made to decide those issues. At this stage, all the court had to decide was whether the defendant had shown a sufficient case to allow the court to give the defendant an opportunity to argue the issues raised by it. The research of both counsel shall not go to waste. Therefore, the court allowed the defendant's application that the issues raised be set down and tried as preliminary issues before the trial of other issues raised in the action (see pp 287F-288B).

A [Bahasa Malaysia summary]

Plaintif mendakwa defendan untuk libel yang terkandung di dalam suatu rencana yang diterbitkan di dalam akhbar. Defendan mengakui menerbitkan rencana tersebut tetapi menimbulkan pembelaan perlindungan bersyarat. Defendan memfailkan suatu permohonan untuk kebenaran di bawah A 32 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk memutuskan isu-isu tertentu sebelum perbicaraan. Plaintif menimbulkan bantahan awal bahawa affidavit sokongan untuk permohonan defendan telah disampaikan lebih daripada 14 hari dari tarikh permohonan difailkan. Defendan menghujahkan bahawa affidavit tersebut yang ditandatangani oleh peguam plaintif telah dengan jelasnya merujuk kepada fakta bahawa saman tersebut telah disampaikan di luar tempoh 14 hari dan bukannya kepada penyampaian lewat affidavit tersebut. Adalah dihujahkan bahawa saman tersebut telah disampaikan dalam masa mengikut A 32 k 3.

Diputuskan, menolak bantahan awal dan membenarkan permohonan defendan:

(1) Plaintif mesti mengetahui bahawa jika beliau telah memplidkan dengan spesifik di dalam affidavit tersebut bahawa saman tersebut telah disampaikan di luar tempoh dan tidak menyebut dalam fakta bahawa affidavit tersebut telah disampaikan lewat, maka itu sahajalah yang defendan adalah diharapkan untuk menjawab. Sebenarnya defendan dengan betulnya tidak menjawab kepada affidavit peguam plaintif kerana defendan berpuas hati dengan bergantung kesnya kepada A 32 k 3 dan fakta bahawa defendan telah demikian menyampaikan saman tersebut di dalam masa. Hujahan bahawa defendan seharusnya mengetahui bahawa affidavit tersebutlah yang plaintif membantah merupakan hujah yang non sequitur (lihat ms 287D-E).

(2) Kedua-dua pihak telah menghujah sepenuhnya atas isu-isu yang berkenaan. Jika mahkamah memutuskan atas isu-isu tersebut pada tahap ini, maka mahkamah mengosongkan terlebih dahulu permohonan sebenar tersebut yang seharusnya dibuat untuk memutuskan isu-isu itu. Pada tahap ini mahkamah hanya perlu memutuskan sama ada defendan telah menunjukkan kes yang mencukupi untuk membenarkan mahkamah untuk memberi defendan suatu peluang untuk berhujah tentang isu-isu yang dibangkitkan olehnya. Kajian kedua-dua peguam tidak sepatutnya disia-siakan. Maka, mahkamah membenarkan permohonan defendan bahawa isu-isu yang dibangkitkan adalah ditetapkan dan dibicarakan sebagai isu-isu awal sebelum perbicaraan isu-isu lain yang dibangkitkan di dalam tindakan tersebut (lihat ms 287F-288B).]

Notes

For cases on facts not pleaded, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3534–3536.

Cases referred to

Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (refd)

Legislation referred to

Defamation Act 1957 s 12, Sch Part II

Rules of the High Court 1980 O 3 r 2(2), O 32 rr 3, 13(2)(a), O 33 r 2

Karpal Singh (M Manoharan & Gobind Singh Deo with him) (Karpal Singh & Co) for the plaintiff.

VK Lingam (V Siva & R Thayalan with him) (V Siva & Partners) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:*The statement of claim*

The plaintiff was the Deputy Prime Minister of Malaysia. The plaintiff sued the defendant for RM100m for libel contained in an article headed:

Anwar's behaviour despicable: PM

The defendant is the publisher and printer of *The Sun* newspaper. The plaintiff contends that the said article was published falsely and maliciously. For the purposes of this application it is unnecessary to go into the details of the publication. The plaintiff thus claimed in addition to the damages, an injunction to restrain the defendant by its directors, servants and/or agents from further publishing the said or any similar libel. The plaintiff also claimed for interests and costs.

The defence

In its defence, inter alia, the defendant admitted publishing the entire article which the defendant contended was in addition to a longer article published as the front page lead story under the heading 'Anwar's fear: He faces at least 12 sex-related charges' which was continued on p 2 under the sub-heading 'Mahathir: Police surprised by how far protesters would go'. The defendant contended that it would refer to the whole of both articles to establish the context in which the words complained of were published. The defendant denied the allegation of malicious publication.

The defence was one of qualified privilege and the defendant contended that it was its legal and moral duty to publish the said article as the public had a legitimate interest to receive the said information that was

A published. To avoid doubt the defendant reproduced the full text of the Prime Minister's press conference out of which arose this suit for defamation.

B The defence also raised statutory qualified privilege by pleading that the said words were a fair and accurate report of a press conference held by the Prime Minister of Malaysia by and on behalf of the Government of Malaysia for the benefit and information of the public. In respect of this defence of statutory qualified privilege the defendant specifically relied upon the provision of s 12 of the Defamation Act 1957 and Part II of the Schedule to the Defamation Act 1957.

C Thirdly the defence was, that the words complained of were published upon an occasion of qualified privilege because they were, or formed part of a reply by the Prime Minister, to an attack upon the Prime Minister by the plaintiff who alleged that the Prime Minister was part of a conspiracy to 'fabricate and create charges' against him. Accordingly the defendant contended that in publishing the words complained of, the defendant was publishing the reply of the Prime Minister to an attack upon him by the plaintiff for which the plaintiff had sought and obtained wide publicity.

The reply

E In his reply the plaintiff contended that the defence of qualified privilege was not open to the defendant as the defendant was actuated by malice.

This application

F The defendant filed this application for leave to try certain issues pursuant to O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). The said rule reads as follows:

- 2 The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

G The reason for the introduction of this rule is obvious. If a party who invokes this rule is able to show to the court that by trying certain issues of fact or law before the full trial of the suit and by so doing the case can be brought to a conclusion expeditiously then the court will grant the person invoking this particular order and rule leave to pose that particular issue of fact or law or of mixed fact or law to be tried well before the full trial of the suit which might even take years to conclude.

H The defendant in this case has applied by this application for leave for the following issues to be decided well before this trial and by so doing the defendant contends that the case can be concluded much earlier.

I The defendant wishes the court to decide:

- (1) if the said publication complained of was protected by qualified privilege at common law;

- (2) whether the said publication was published upon an occasion of statutory qualified privilege by virtue of the provision of s 12 of the Defamation Act 1957 and para 5 of Part II of the Schedule to the Defamation Act; and **A**
- (3) whether the words complained of were published upon an occasion of qualified privilege because they were or formed part of a reply to an attack. **B**

There were other consequential prayers seeking for directions and for costs.

Preliminary objection by the plaintiff

On 6 May 1999 when I heard this application, Mr Karpal Singh raised a preliminary objection. He pointed out that this application (encl 8) was filed on 6 April 1999 and that the affidavit in support of the said application which was also affirmed on 6 April 1999 was served on his firm on 21 April 1999. He contended that this was in flagrant breach of O 32 r 13(2)(a) of the RHC. The said rule reads as follows: **C**

(2) Save as otherwise provided in these rules — **D**

- (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

Pointing out that encl 7 (the affidavit) although filed on 6 April 1999, was only signed by the senior assistant registrar on 19 April 1999, Mr Karpal Singh argued that the date to account for the 14 days, ought to run from 7 April 1999, since the date of filing ought not to be counted. He relied on O 3 r 2(2) of the RHC which reads: **E**

Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date. **F**

In support of his contention that time must run from the date of filing and not when it was sealed, Mr Karpal Singh relied on *Structural Concrete Sdn Bhd & Ors v Wing Tie Holdings Bhd* [1997] 1 MLJ 581 where the Court of Appeal said at p 586: **G**

However, we would like to add that the critical words in O 32 r 13(2) — for the purposes of computation of time — are ‘within 14 days from the date of the filing of the application’ and in O 32 r 13(2)(b) within 14 days from the date of service.

Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. **H**

If Mr Karpal Singh’s argument and calculations are correct clearly the defendant had indeed served on the 15th day and was out of time by one day.

In reply, Dato’ VK Lingam read out para 4 of encl 9 which was the affidavit signed by Gobind Singh Deo, counsel for the plaintiff. In the said para 4 Mr Gobind Singh Deo had clearly referred, not to the late service of the affidavit but he specifically referred to the fact that the summons was **I**

- A** served outside the 14-day period. Whilst agreeing with Mr Karpal's submission that O 32 r 13(2)(a) refers to the need for an affidavit to be served within the 14-day period, Dato' Lingam pointed out that this was never raised in the affidavit as an issue. Since the objection taken was that the summons was served out of time it was pointed out to me by the defence that pursuant to O 32 r 3 of the RHC a summons 'must be served on every other party not less than 2 clear days before the day so specified'. Since the date specified in the summons was 6 May 1999 the defendant argued that having served the summons on 21 April 1999, the summons was thus served well within time.
- B**

- C** In response, Mr Karpal argued that a summons would include an affidavit which would accompany a summons in any case. Mr Gobind Singh Deo also submitted that the defendant ought to have known that the plaintiff was in fact objecting to the affidavit.

I dismissed the plaintiff's preliminary objection on that very day. In the event of an appeal, I now give my grounds.

- D** The plaintiff must know that if he had specifically pleaded in this affidavit that the summons was served out of time and made no mention of the fact that the affidavit was served one day later, then that is all that the defendant is expected to reply. In fact the defendant very correctly in my view made no reply to Mr Deo's affidavit because the defendant was content to rest its case on O 32 r 3 of the RHC and the fact that the defendant had therefore served the summons well within time. The submission that the defendant ought to know that it was the affidavit the plaintiff was objecting to, is an argument that is a non-sequitur. I must also take into consideration the fact that the said affidavit was indeed sworn by a solicitor and not by his client.
- E**

- F** As for the application proper it is my considered judgment that both the solicitors in this case have failed to see the wood for the trees. This is after all only an application for leave for me to consider if the defendant can be allowed to raise these three issues before trial. Let me illustrate. The defendant has submitted fully on the issues of qualified privilege, statutory qualified privilege and qualified privilege as a reply to an attack. If I decide on these issues at this stage based on the submissions of both parties then I am pre-empting the actual application that ought to be made to decide these issues. In the same way the plaintiff has raised the issue of malice and touched on the defendant's allegation of fair comment. Both sides have submitted fully on these respective issues. I have deliberately refused to make a ruling on any of these issues raised by the parties at this stage. Parties must realise that once I make a decision on their present submissions they can be precluded from raising the same issues on the hearing of the application proper. It is purely to be fair to both parties and not to let them tie their hands and feet with these present submissions and then to make a vain attempt at a Houdini's act at the application proper, that I have deferred deciding on the issues raised.
- G**
- H**
- I**

At this stage, all I have to decide is whether the defendant has shown a sufficient case to allow me to give the defendant an opportunity to argue the

issues raised by it which it says would put an end to what might be a long and protracted trial. I also will have to give the plaintiff a full opportunity to argue his case of malice and which would then support his case for a full trial.

The research of both counsel shall not go to waste. I shall therefore allow the defendant's application that the issues raised therein be set down and tried as preliminary issues before the trial of other issues raised in this action.

Preliminary objection dismissed and defendant's application allowed.

Reported by Jafisah Jaafar

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